United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 74-2597

United States Court of Appeals

For the Second Circuit.

B
P/S

PAUL CAMPBELL,

Plaintiff-Appellee,

-against-

R.G. DICKINSON & CO., ROBERT GOODELL DICKINSON and MAURICE BURR CORNELISON,

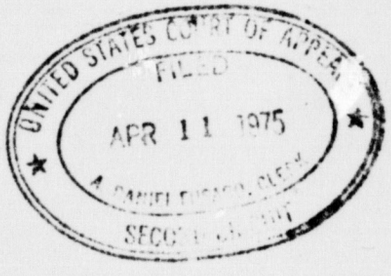
Defendants,

R.G. DICKINSON & CO.,

Defendant-Appellant.

Appeal From the United States District Court for the Southern District of New York

BRIEF OF PLAINTIFF-APPELLEE



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ISSUES PRESENTED FOR REVIEW

1. Was the evidence offered by plaintiff-appellee Paul Campbell ("Campbell") sufficient to warrant the Court below to submit to the jury Campbell's claim for breach of employment contract?

2. Was the evidence offered by Campbell sufficient to warrant the Court below to submit to the jury Campbell's claim for repayment of loan?

3. Was the Court below correct when it denied defendant-appellant R. G. Dickinson & Co.'s ("RGD & Co.") motion(s) for judgment notwithstanding the verdict?

STATEMENT OF THE CASE

Campbell commenced an action in the United States District Court for the Southern District of New York, based upon two claims:

(a) Breach of employment contract; and

(b) Non-payment of loan.

In due course, the matter proceeded to trial before a Court and jury.

After Campbell's case, RGD & Co. moved for a directed verdict, on the breach of employment contract, on the grounds that Campbell resigned; and on the second count of non-payment of loan, on the grounds that the evidence was incredible (A., pp. 60, 65) . The Court reserved decision and let the issues go to the jury (A., pp. 66-68).

Four special interrogatories were propounded to the jury and answered as follows: (Judgment)

1. Did the defendant, R. G. Dickinson & Co., agree to employ plaintiff for one year, at $2,500 a month plus expenses?

Answer: Yes

2. Was plaintiff discharged, or did he resign after six months? [Check (a) or (b)]

(a) Discharged X

(b) Resigned _____

3. Was the $15,000 paid by plaintiff to R. G. Dickinson a loan by plaintiff to R. G. Dickinson?

Answer: Yes

4. Did plaintiff convert the typewriter?

Answer: No

The jury was polled, and each juror affirmed his verdict. The Court then complimented the jury and reaffirmed the dollars and cents of the verdict (A. , pp. 85-86). RGD & Co. then renewed its motion tc move for judgment notwithstanding the verdict, or alternatively, for a new trial on the grounds that the verdict was against the weight of evidence (A., p. 86). The Court carefully reviewed the evidence, reaffirmed the right of the jury to decide the issues of fact, and denied RGD & Co.'s motion (A ., pp. 86-88), further setting forth carefully the fact that the jury had sufficient grounds to sustain its verdict.

Campbell then entered judgment together with interest and costs, and RGD & Co. again moved for judgment notwithstanding

verdict (see Motion for Judgment, etc.; A., pp. 94-96). The substantive relief was denied (Memorandum Order; A., p. 97).

FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

A. First claim: for damages as a result of RGD & Co.'s breach of employment contract.

It is conceded that Campbell was hired as an employee of RGD & Co., pursuant to an oral contract, for employment in the City and State of New York.

Campbell testified that he was employed for one year at a salary of $2,500 per month (A., p. 50). This evidence was buttressed by the testimony of John Brainard, II ("Brainard"), a party to the making of the agreement, that Campbell was hired by RGD & Co. for one year at a salary of $2,500 per month (A., pp. 26-27, 42, 45-46). Maurice Burr Cornelison ("Cornelison"), on behalf of RGD & Co., testified confusedly that Campbell was hired:

(a) for an indefinite term (A., p. 11);

(b) for six months (A., p. 12);

(c) for no specific time (A., p. 12).

That his salary was to be:

(a) $2,000 per month for six months (A., p. 12);

(b) against commission (A., p. 13);

(c) that Campbell was unable to collect commissions because he was, at the time he was hired, unlicensed as a securities broker (A., pp. 14-16).

It is conceded that RGD & Co. was opening a branch sales office in New York at the time Campbell was hired (A., pp. 10-28) and that Campbell was to work in that office (A., p. 11).

The time required to open this office and get it going was approximately a year (A., p. 50).

Campbell testified that he was fired (A., pp. 52-53), that RGD & Co. closed its New York office, and that the people in New York were out of a job (A., p. 51). The actions of RGD & Co. were clear that he no longer had a job.

RGD & Co. testified, through Cornelison, that, in fact, the New York office was closed (A., p. 17), and Campbell was not offered an opportunity to move to another branch (A., pp. 18, 19), and that no further services were rendered by Campbell.

Brainard testified that the New York office was closed, and Campbell was not offered an opportunity to continue working for RGD & Co. (A., pp. 28-29).

Campbell testified that he submitted a letter at the time he was fired that stated he resigned. He testified that this was only to facilitate his re-registration with a new company and that in his mind, there was no question that he was fired (A., p. 52).

Cornelison testified that the purported letter of resignation was very near the date of the closing of the office (A., p. 18).

No evidence was submitted by RGD & Co. that it ever accepted or took any action relative to the purported resignation.

B. Second claim: for repayment of a loan in the sum of $15,000.

The trial record shows:

(a) that Campbell gave RGD & Co. $15,000 (A., pp. 23, 55);

(b) at a time that he was not licensed to do securities trades (A., pp. 11, 53);

(c) without being obliged to part with this sum (A., pp. 31, 70-71, 73-74, 77);

(d) expecting and being promised repayment (A., pp. 48, 62-64).

(e) This transaction was considered a loan (A., pp. 37, 47, 55, 58);

(f) Campbell made demand for repayment (A ., pp. 25, 55, 56, 92, 57, 58, 62, 75-76); and

(g) it was refused (A ., pp. 25, 57).

Upon motion after trial for judgment notwithstanding the verdict, the Court observed that RGD & Co. failed to produce Phillip Boesel ("Boesel") as a witness and that there was no contradiction of the loan transaction by him(A, p.87). This was not cited by the Court as the only basis for denying RGD & Co.'s motion, nor was any special emphasis placed upon this fact by the Court.

Boesel was participative of the employment of Campbell (A ., pp. 9, 43-46, 49), reviewed the confirmation and circumstances surrounding the securities error that was the reason for the $15,000 loan (A., pp. 21, 40, 41), discussed the terms of the $15,000 loan (A ., pp. 22-23, 32-33, 55); and demand for repayment was made to Boesel and refused (A ., pp. 24, 91, 57, 62-64).

SUMMARY

Campbell has proven that he was employed by RGD & Co., pursuant to an oral agreement, for one year at a salary of $2,500 per month and that he was fired. Campbell has proven that he loaned $15,000 to RGD & Co., demanded payment and it was refused. On both these issues, the Court properly submitted the determination of fact to the jury and did not err in refusing to set aside the verdict of the jury.

POINT I

CAMPBELL HAS SUSTAINED THE BURDEN OF PROOF, AS TO HIS EMPLOYMENT CONTRACT AND ITS BREACH BY VIRTUE OF RGD & CO.'S FIRING OF HIM.

In RGD & Co.'s brief, it concedes that Campbell sustained his burden; that he was employed by RGD & Co. for one year at a salary of $2,500 per month. This concession further concedes that the jury's determination on that issue was conclusive (Brief of Defendant-Appellant, p. 19).

The thrust of RGD & Co.'s argument is that Campbell sent a so-called "letter of resignation" and, therefore, he could not have been discharged. This concept is misplaced since Campbell testified that he considered he was fired (' A, pp. 52-53), and RGD & Co. never offered any rebuttal to this claim. Campbell clearly explained his letter was not, in fact, an act of resignation but was, rather, a formality followed to ease his re-registration with a new brokerage firm (A., p. 52).

Campbell's witness, Brainard, testified that the New York office was closed, and Campbell was not offered an opportunity to continue working for RGD & Co. (A., pp. 28-29). Indeed, with the closing of the New York office, there was no further opportunity to work for RGD & Co. here and, thus, consistent with the allegation that he was fired.

The Appellate Division, First Department, in the matter of Levitz v. Robbins Music Corporation, 6 A.D.2d 1027, 178 N.Y.S.2d 222, reversed summary judgment granted to defendant, and held that issues of fact existed, as to whether the purported voluntary resignation was, in fact, a forced discharge. See also Matter of Sarle (Sperry Gyroscope), 4 A.D.2d 638, 168 N.Y.S.2d 228, aff'd 4 N.Y.2d 917, 174 N.Y.S.2d 665; 1 Edward Brown Inc. v. Astor Supply Co., 4 A.D.2d 177, 164 N.Y.S.2d 107.

In the instant appeal, the jury was faced with an interrogatory designed for them to determine if, in fact, Campbell was discharged, or did he resign? (Interrogatory 2; A., p. 84). The jury answered that Campbell was discharged. They were obviously persuaded that although a letter was submitted, Campbell was, in fact, discharged. It is undisputed that the office of RGD & Co. was closed in New York, that he was not offered another position and, in fact, RGD & Co. did not resume any business in New York.

The words "you're fired" need never have been spoken in order to spell out a firing. If Campbell did nothing with reference to a letter of resignation when he was informed that the office was closing, there is no question but that he was discharged. The element of Campbell's letter was, thus, appropriate for a jury determination as to its effect.

RGD & Co. relies upon Merrill v. Wakefield Rutlan Co., 1 App. Div. 118, 37 N.Y.S. 64, and reproduced the Court's language in 1896.

The Court there held that there was a cancellation of contract by mutual consent. In the case at bar, RGD & Co. never accepted Campbell's resignation and, further, they closed the premises where Campbell reported to work without instructing him as to where he should then report.

The facts in Merrill indicate that Merrill was a long-time general manager of Wakefield. A new corporation was formed to perform their business, and Merrill was elected its president and a director. The new company continued his former salary. Wakefield sent a letter requesting the resignation of plaintiff as president and director of the new company, and that his connection with the business would cease upon acceptance. In response to this request, plaintiff did, in fact, unconditionally offer his resignation. Defendant accepted the resignation and directed plaintiff to sever his relationship with the company.

In the case at bar, the facts are not even close. No mutual agreement existed; RGD & Co. just advised Campbell that it was closing its business in New York and never gave him instructions to report to work elsewhere. There is no confusion

on the part of any party that Campbell was, in fact, fired.

In the Sarle case, supra., the Appellate Division, First Department, stated:

> "It does not merit discussion that a purported voluntary resignation may not be what it appears to be. Nor is such a resignation one that has conclusion effect. A tribunal - an arbitration, as much as a court - may, upon evidence presented to it, determine that the act was not voluntary and that it was voidable or void, depending upon the circumstances."

It is apparent that it was proper to submit the issue of resignation to the jury and that its determination is binding.

POINT II

CAMPBELL HAS SUSTAINED THE BURDEN OF PROOF THAT HE LOANED $15,000 TO RGD & CO., MADE DEMAND FOR REPAYMENT, AND IT WAS REFUSED.

The issue urged by RGD & Co. on this portion of the appeal is that Campbell failed to sustain the burden of proof as to the loan of $15,000 to RGD & Co. It is apparent that if Campbell sustained this burden, then the jury's determination would be conclusive.

When Campbell gave RGD & Co. $15,000, it was clearly a loan. The term "loan" has been defined as "an advance of money with an absolute promise to repay", Bankers Mortgage Co. v. Comm. of Internal Revenue C.C.A., Tex., 142 F.2d 130, 131;"a borrowing of money or personal property by a person who promises to return it," State v. Moltzner, 141 Or. 355, 17 P.2d 555, 556; "a contract whereby one delivers money to another who agrees to return an equivalent sum." Eastern Oil Corp. v. Strauss Tex., Civ. App. 50 S.W.2d 336, 346. See also City National Bank Bldg. v. Helvering, 68 App. D.C. 344, 98 F.2d 216; Ortiz Oil Co. v. Commissioner of Internal Revenue, 5th Cir., 102 F.2d 508.

It is conceded that $15,000 was given to RGD & Co. by Campbell (A., pp. 23, 55) , that Campbell had no obligation to RGD & Co. (A., pp. 34, 70-71, 73-74, 77), and that

Campbell expected and was promised its repayment(A., pp. 48, 62-64). This transaction was treated as a loan (A., pp. 37, 47, 55, 58).

Campbell testified to a demand for its return (A., pp. 25, 55, 56, 92, 57, 58, 62, 75-76).

It is conceded that it was never repaid (A., pp. 25, 57).

Although RGD & Co. may contend that there was no specific time for repayment of this loan, we draw an analogy to the U.C.C. §3-108, which declares that an instrument in which no time for payment is stated is payable on demand. See In Re Ewalds Estate, 1940, 174 Misc. 939, 22 N.Y.S.2d 299; Chelsea Exchange Bank v. Warner, 1922, 202 App. Div. 499, 195 N.Y.S. 419; Sheldon v. Heaton, 1895 88 Hun. 535, 34 N.Y.S. 856.

Although Campbell acted informally in this transaction, it is clear that RGD & Co. may not be unjustly enriched at the expense of Campbell by not repaying the $15,000 advanced by Campbell to RGD & Co.

It is apparent that there was sufficient evidence to support a loan, and the Court did not abuse its discretion in not setting aside the jury's verdict.

The testimony of Mr. Dickinson that there was no obligation of Campbell to RGD & Co. had to be most damning in the eyes of the jury. (A., p. 73).

> "Q - It was interesting on your examination that you said that the company did not hold Mr. Campbell responsible for the loss in the Mutual Oil. Was that a correct reference to what you said?
>
> "A - That is correct. We did not hold Mr. Campbell. We held Mr. Brainard accountable for that."

If Campbell were under no obligation to pay the $15,000 to RGD & Co., it is quite consistent that the jury held in answer to its third interrogatory that this transaction was a loan.

RGD & Co. urges there was no absolute promise to repay the $15,000 (Brief of Def.-App., p. 17).

Campbell testified as follows: (A., pp. 54-55)

> "Q - Whatwere the circumstances of your recollection of the giving of the $15,000 by you if you can tell us?
>
> "A - Well, that in effect the company, the firm, was looking to the New York office to make up for the loss in this transaction. Mr. McNell flatly refused to do it. Mr. Brainard did not have the money or the access to the money to be able to do it. So,

being the only one left, I was the logical third party to ask. I was told by Mr. Boesel personally that this would be repaid either in terms of increasing my commission percentage when I got registered or over in a bonus or in some way it would be repaid and that they were men of good faith. And the securities business is done on one's word. And that if I would pay them the money, that I would in one way or another get it back. Also I wanted to make sure that the office would remain intact and it would continue and so on and so forth. So that again was guaranteed to me verbally.

"So after a lot of soul-searching I decided then in the best interests of the office and myself, everybody else, I would take a chance and do it. So I paid them $15,000, the loan of $15,000."

Boesel was never produced to rebut this testimony. It is axiomatic that the Court below properly charged, that the failure to produce Boesel, would permit the jury to infer, that the testimony that Boesel would have given, would have been unfavorable to RGD & Co. if he were called (A.,pp. 83, 87).

RGD & Co. cites Oliveras v. American Export Isbrandtson Lines, Inc., 431 F.2d 814 (2d Cir., 1970), but misplaces the emphasis of what it stands for. Oliveras is an an admiralty case that held if the undisputed evidence results in a verdict that is totally without legal support, a new trial is warranted. Clearly, in the case at bar, there is substantial evidence to support the verdict.

Likewise, Blumenfeld v. Harris, 3 A.D.2d 219, 159 N.Y.S.2d 561 (1st Dept., 1957), aff'd 3 N.Y.2d 905, 167 N.Y.S.2d 925, 145 N.E.2d 871, cert. den., 356 U.S. 930, 2 L. ed.2d 761, 78 S.Ct. 773 (1958),are inappropriate. In Blumenfeld, an employee alleged that he paid money under duress but was factually unable to substantiate his claim. In the instant appeal, Campbell testified his payments were a loan, that he was promised repayment and that it was refused. RGD & Co. has not presented any basis for a reversal of the judgment of the Court below.

CONCLUSION

This Court should affirm the judgment of the Court below.

Respectfully submitted:

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Campbell v. Dickinson

STATE OF NEW YORK)
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COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 11 day of April, 1975 deponent served the within Brief upon Shaw, Bernstein, Scheuer Boyden + Sarnoff

attonrye(s) for appellant

in this action, at 292 Madison Ave. N.Y.C.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
11 day of April, 1975.
William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976